CHUA CHA SAN

v.

SYARIKAT GETAH SIN ENG LEONG SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: MT1-12-45-2004]
10 FEBRUARY 2006

***CIVIL PROCEDURE*:** *Appeal - Adducing fresh evidence - Order 55 r. 5A(a) and (b) Rules of the High Court 1980 - Evidence must be relevant and within ambit and scope of issues pleaded*

The plaintiff claimed against the defendant a sum of RM130,923.38. The defendant's original defence and the amended defence did not plead any issue of forgery of various vouchers and documents. Summary judgment was entered and the defendant appealed against it. Pending hearing of the substantive appeal, the defendant filed this application under O. 55 r. 5A of the Rules of the High Court 1980, for leave to admit in the appeal fresh evidence *viz* the report from the Chemistry Department and the documents connected therewith ("the fresh evidence"). The fresh evidence was the finding and report of the document examiner that the signatures in various vouchers and documents had been forged. The application was based on the grounds that reasonable diligence would not have made the new evidence available to the defendant at the hearing of the application for summary judgment and that the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision. The plaintiff's counsel however contended that the defendant's original or amended statement of defence did not plead forgery, as a result of which the defendant was not entitled to rely on forgery now.

Held (dismissing the application with costs):

[1] Fresh evidence may be admitted at the discretion of the appellate judge provided that the applicant satisfies the judge of the fulfilment of the two conditions *viz* O. 55 r. 5A(a) and (b). (p. 68 d)

[2] It is axiomatic that before the fresh evidence may be allowed, the applicant must first fulfill the requirement of the general law of evidence governing relevancy and admissibility. The fresh evidence must be relevant to the matter for consideration by the court before it can be rendered admissible. The fresh evidence must be within the ambit and scope of the issues pleaded. (p. 68 d-e)

[3] The fresh evidence sought to be adduced by the defendant was founded on forgery which necessarily fathomed an element of fraud. By virtue of O. 18 r. 12(1)(a), fraud is one of the issues which must be specifically pleaded. A *fortiori*, the absence of pleading based on forgery and fraud was fatal to the defendant's application herein. (p. 69 a-b)

Case(s) referred to:
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 HC ***(refd)***
John Trawe Kuda v. Adtec Sdn Bhd [1996] 4 CLJ 42 HC ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lam Soon Cannery & Co v. Hooper & Co [1965] 2 MLJ 148 FC ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 FC ***(refd)***
Lim Hee Chuan v. Toh Phaik Har [1949] MLJ 92 ***(refd)***
Norfaiz Azli Muhammad v. Abdullah Yaman [2001] 4 CLJ 371 HC ***(refd)***
Renal Link (KL) Sdn Bhd v. Dato' D Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***
Shedden v. Patrick [1869] SC 470 ***(refd)***
Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 12(1)(a), O. 55 r. 5A(a), (b)
Subordinate Courts Rules 1980, O. 26A

Other source(s) referred to:
Malaysian High Court Practice 1998, Desk edn. vol. 1 MLJ, p 485

For the plaintiff - Datuk Kesavan P Krishnan; M/s Kesavan & Assoc
For the defandant - James Edwin Pushparatnam; M/s James Edwin & Co

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Application

Before me is encl. (16) which is an application by way of summons in chambers filed by the appellant-defendant ("the defendant") under O. 55 r. 5A of the Rules of the High Court 1980, for leave to admit in this appeal fresh evidence *viz* the report from the Chemistry Department dated 27 January 2005 and the documents connected therewith ("the fresh evidence"). The fresh evidence is the finding and report of the document examiner that the questioned and specimen signatures in various vouchers and documents were not of the same authorship and so had been forged.

A reference hereinafter to an order and a rule shall be a reference to that order and rule unless otherwise stated.

This application is based on the grounds that reasonable diligence would not have made the new evidence available to the defendant at the hearing of the application for summary judgment under O. 26A Subordinate Courts Rules 1980 before the sessions court; and that the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the sessions court. These grounds represent the conditions prescribed under O. 55 r. 5A(a) and (b).

Factual Background

The plaintiff's claim against the defendant is for the sum of RM130,923.38 with interest at 8% p.a. from 23 September 1998 to the date of realisation, being advance by the plaintiff to the defendant in consideration of the defendant supplying latex to the plaintiff until the advance has been fully set off.

The defendant's original defence dated 20 August 2003 and the amended defence dated 20 January 2004 did not plead any issue of forgery of various vouchers and documents which the defendant sought to adduce as fresh evidence in this application.

On 13 July 2004, the Sessions Court entered summary judgment against the defendant who has apapealed therefrom.

Pending hearing of the substantive appeal, the defendant has filed this application.

Order 55 r. 5A

Before O. 55 r. 5A came into being on 21 September 2000, the "fresh evidence" rule has also been expounded earlier by our courts in *Lim Hee Chuan v. Toh Phaik Har* [1949] MLJ 92; *Lam Soon Cannery & Co v. Hooper & Co*. [1965] 2 MLJ 148 FC; and *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 FC, following *Ladd v. Marshall* [1954] 3 All ER 745; and *Shedden v. Patrick* [1869] LR 1 HC, SC 470.

The importance of O. 55 r 5A makes it imperative for me to refer to it as follows:

Restriction on fresh evidence. (O. 55 r 5A)	5A. At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
	(a) at the hearing before the subordinate court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court.

[PU(A) 342/2000]

Order 55 r. 5A has to a great extent given statutory expression to the rule enunciated by Lord Denning MR in *Ladd v. Marshall*, *supra* at p. 748 (see also *John Trawe Kuda v. Adtec Sdn Bhd* [1996] 5 MLJ 335 at p. 342 per Richard Malanjum J (now FCJ); *Renal Link (KL) Sdn. Bhd. v. Dato' Dr. Harnam Singh* [1997] 3 CLJ 225 CA; per Gopal Sri Ram JCA; *Norfaiz Azli Muhammad v. Abdullah Yaman* [2001] 4 CLJ 371 per Ramly Ali JC (now J); and *Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn. Bhd*. [2003] 7 CLJ 124 HC. It had been drafted in such a way as to provide for the general rule of excluding fresh evidence at the hearing of the appeal. However, exceptionally, fresh evidence may be admitted at the discretion of the appellate judge provided that the applicant ie, the defendant herein satisfies the judge of the fulfilment of the two conditions *viz* (a) and (b) stated therein.

It is axiomatic that before the fresh evidence may be allowed, the defendant as the applicant must first fulfil the requirement of the general law of evidence governing relevancy and admissibility. The fresh evidence must be relevant to the matter for consideration by the court before it can be rendered admissible. The defendant must satisfy the condition precedent that the fresh evidence is within the ambit and scope of the issues pleaded in his original or amended statement of defence.

Fresh Evidence And Defence

Learned counsel Mr. James Edwin Pushparatnam, assisted by Mr. Colin Victor submitted for the defendant that reasonable diligence would not have made the fresh evidence available to the defendant under the second limb of O. 55 r. 5A(a) as the fresh evidence containing the document examiner's finding of forgery was only surrendered to the investigating officer one Inspector Mohd Saadon bin Sabirin on 8 March 2005 while summary judgment had already been given on 13 July 2004. They added that the fresh evidence has also fulfilled the condition contained in O. 55 r. 5A(b).

Plaintiff's learned counsel Datuk Kesavan contended that the defendant's original or amended statement of defence contains admissions and bare denials but did not plead forgery, as a result of which the defendant is not entitled to rely on forgery now, citing my judgment in *Tetuan Tanjung Teras*, *supra.*

It is abundantly clear to me that the fresh evidence sought to be adduced by the defendant is founded on forgery which necessarily fathoms an element of fraud. By virtue of O. 18 r. 12(1)(a), fraud is one of the issues which must be specifically pleaded, by setting out the particulars thereof so that the parties are informed with reasonable particularity as to the matters which are alleged against them so that no party is taken by surprise (see *Malaysian High Court Practice 1998* Desk Edn. Vol. 1 MLJ p. 485). Hence, even general allegations of fraud are insufficient to amount to an averment of fraud (*Ibid* p. 486). A *fortiori*, the absence of pleading based on forgery and fraud is fatal to the defendant's application herein.

A case in point is *Tetuan Tanjung Teras*, *supra,* where the defendant applied for, *inter alia*, leave to adduce fresh evidence for the purpose of setting aside the summary judgment given by the sessions court. The fresh evidence was purportedly founded on a contract of "building credit business" in contravention of the Banking and Financial Institutions Act 1989 and hence void in law. However, that issue has never been pleaded in the defence. At p. 470H, in dismissing the defendant's application, I held that the parties are bound by their pleadings: see eg, *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 HC. I also emphasised that the application demonstrated how important it is to have a strong foundation and knowledge in the basic rules of civil procedure in order to be placed on the right track in handling litigation for parties in court.

Conclusion

On the foregoing grounds, I hold that the defendant's application is without any substance. Hence, I dismiss it with costs.